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EQUITABLE RELIEF AGAINST TORTS

AMONG the treatises on Equity recently published are the survey in one volume by Professor George L. Clark of the University of Missouri;[1] the fourth edition of Pomeroy's exhaustive work, in six volumes;[2] the fourteenth American edition of Story, by W. H. Lyon, Jr., in three volumes;[3] and the third English edition of Story, by A. E. Randall, in one volume.[4]

The recent decisions on the scope of equity jurisdiction, specific performance, and trusts have already been presented in this series by others.[5] The topics in Equity discussed in this article comprise injunctions against torts.

(1) *Waste, Trespass and Violations of Easements*

The position of a tenant for life without impeachment of waste is neatly brought out by *Gage* v. *Pigott*.[6] Ornamental timber was cut down by the government under its power of eminent domain. It was held that the proceeds should be invested to follow the settlement, the income being paid to such a tenant for his life; although he could not cut down the trees himself, he was entitled to enjoy them during his tenancy, and consequently to benefit from the monetary substitute for the same period. If they had been tortiously felled by an outsider, the same result would follow.

The growing willingness of American courts to grant interlocu-

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[1] E. W. Stephens Pub. Co., Columbia, Mo., 1919; reviewed in 33 HARV. L. REV. 122 (1919); 18 MICH. L. REV. 817; 15 ILL. L. REV. 132 (1920). See also his "Equitable Relief against Nuisances and Similar Wrongs in Missouri," 20 UNIV. MO. BULL. No. 32, Law Series, 17.

[2] Bancroft, Whitney Co., San Francisco; Lawyers Co-operative Pub. Co., Rochester (1919).

[3] Little, Brown, & Co., Boston (1918); reviewed in 19 COL. L. REV. 88; 67 U. OF PA. L. REV. 210; 28 YALE L. J. 718; 3 MINN. L. REV. 437; 88 CENT. L. J. 347; 17 MICH. L. REV. 351; 6 VA. L. REV. 550; 15 ILL. L. REV. 132.

[4] Sweet & Maxwell, Ltd., London; to be reviewed subsequently.

[5] "Equity," Roscoe Pound, 33 HARV. L. REV. 420, 813, 929; "Trusts," A. W. Scott, *ib.* 688.

[6] 53 Ir. L. T. R. 33 (1918); noted in 33 HARV. L. REV. 618 (1920).

tory mandatory injunctions is shown by *Keys* v. *Alligood.*[7] A temporary injunction restraining the defendants from interfering with a road had been wilfully violated by them. After hearing, the defendants were ordered to restore the road to its original condition at once. On appeal the order was sustained. The court first observed that since the defendants could be punished for the contempt by fine or imprisonment, they could be allowed as an alternative to make reparation. The decision is then rested on the broader ground that the order was valid as a mandatory injunction, which may be issued in a proper case on preliminary hearing.

"Gross violations of rights may occur in the shortest possible time; and a few hours' wrongdoing may result in the creation of an intolerable nuisance or in the production of an injury which, if prolonged, might soon become irreparable. In such cases the interposition of the strong arm of the chancellor ought to be most swift; and if the immediate relief afforded could not, in a proper case, be restorative, as well as prohibitory, no adequate redress would, in many instances, be given." [8]

Although Lord Eldon is usually regarded as reactionary, his judicial attitude is frequently in advance of later American judges. His decision in *Lane* v. *Newdigate*,[9] granting a preliminary injunction, mandatory in substance though prohibitory in form, was denounced by Judge Sharswood as "a precedent that ought not to be followed in this or any other court." [10] Nevertheless, the recent case approves *Lane* v. *Newdigate*, but declares that the time has come to abandon its "roundabout mode."

"In these days, we . . . look rather to the substance than to the form of things, as being a more direct, simple, and effective way of dealing with the rights and remedies of litigants. . . . Why not call this process by its right name, instead of granting what is really mandatory, under the guise of preventive relief? When this is done, we are trying to deceive ourselves, for no good or practical reason, when we know what we are actually doing, or what the inevitable effect will be. It is simply adherence to an old form and custom of the court of equity which did not even gain the approval of some of its ablest chancellors. In modern times, since we try to call things by their true and appropriate titles, so

[7] 178 N. C. 16, 100 S. E. 113 (1919). For the same position, see "Mandatory Injunctions," Jacob Klein, 12 HARV. L. REV. 95.

[8] 178 N. C. 16, 18, 100 S. E. 113, 114 (1919).

[9] 10 Vesey, 192 (1804).

[10] Audenried *v.* Philadelphia, etc. R. R., 68 Pa. 370, 375 (1871).

we may be better understood, the decided trend of the courts, especially in this country, is towards a more sensible policy, as we have already shown by authority." [11]

Can an equity court which is asked to enjoin trespasses make a final adjudication of title, or must this be left to an action at law? In *Greeson* v. *Cannon*,[12] a defendant in possession of land claimed by the plaintiff was permanently enjoined from injurious acts, but the equity court held it had no power to add an order to get out. The plaintiff then brought an action of ejectment, in which the law court refused to try the question of title anew, holding that by virtue of the equity suit it was *res adjudicata* in the plaintiff's favor. Such an effect would, of course, not be given to a temporary injunction or even to a permanent injunction against trespasses on foreign land.[13]

The asportation of a chattel was enjoined in *Shrouder* v. *Sweat*.[14] An automobile carrying liquor was seized by the sheriff, who instituted proceedings to have the car condemned and sold. An innocent mortgagee of the car had the sale restrained, until provision was made for the application of the proceeds of the sale to the lien of the mortgage. The frequency of such seizures makes it probable that this point will be often litigated in other states.[15] On the other hand, the owner of a stranded steam yacht could not enjoin a lien creditor who was salving it without any legal right to do so. The plaintiff's hands were considered not to be clean, because he had failed to tender the amount due to the defendant.[16]

A recent New Jersey decision [17] throws doubt on the reasoning of *Hart* v. *Leonard*,[18] a leading case for the narrow view as to the jurisdiction of equity to protect easements. In that case Justice Dixon set forth nine classes of cases in which "courts of equity

[11] 178 N. C. 16, 20, 100 S. E. 113, 115 (1919).

[12] 217 S. W. (Ark.) 786 (1920); noted in 20 COL. L. REV. 622 (1920).

[13] Some courts are unwilling to enjoin foreign trespasses because foreign title is involved. Columbia Dredging Co. *v.* Morton, 28 App. D. C. 288 (1907). *Contra*, Alexander *v.* Tolleston Club, 110 Ill. 65 (1884).

[14] 148 Ga. 378, 96 S. E. 881 (1918).

[15] See 30 YALE L. J. 91 (1920); 34 HARV. L. REV. 200.

[16] Louisiana Agricultural Corp. *v.* Pelican Oil Refining Co., 256 Fed. 822 (C. C. A. 5th, 1919).

[17] Renwick *v.* Hay, 90 N. J. Eq. 148, 106 Atl. 547 (1919).

[18] 42 N. J. Eq. 416, 7 Atl. 865 (1886); 1 AMES, CASES ON EQUITY JURISDICTION, 549.

may, by decree and injunction, protect and enforce legal rights in real estate." Inasmuch as the facts did not fall within any of the nine classes, he automatically refused relief. Vice-Chancellor Lane now comments in *Renwick* v. *Hay*,[19] "I do not conceive that there may not be cases, cognizable in equity, which do not fall strictly within any one of the nine classes mentioned by Justice Dixon." It is to be hoped that the New Jersey Court of Errors and Appeals will also disown the defective reasoning of *Hart* v. *Leonard*, right as its result was because of the adequacy of the legal remedy. Justice Dixon was attempting to apply in law the logical method of elimination or exclusion, which always charmed us in plane geometry. If the line A B is unequal to C D, it must be so in either of two ways, greater or less. Then we prove it cannot be greater and it cannot be less. Therefore it is not unequal, and AB = CD. The difficulty is that this method is sound only when the classification is exhaustive. The list of excluded possibilities must include *all* the possibilities, and of this we can rarely be sure in less exact sciences than mathematics. We know that there are only two kinds of inequality, but Justice Dixon could not be sure that there were only nine kinds of equitable relief, especially when he had failed to go outside New Jersey to search for a tenth category. It is the same fallacy into which Darwin fell in attributing the parallel roads of Glen Roy to the action of the sea, because no other explanation he could think of was possible. Then Agassiz propounded his glacier-lake theory, which Darwin had neglected to consider. And, he adds, "My error has been a good lesson to me never to trust in science to the principle of exclusion." [20]

This question of *Hunt* v. *Leonard* is very important, for it shows the danger in our system of law which has grown up from concrete cases rather than from abstract reasoning, of using precedents as principles *per se* and not as illustrations of a principle. Equity relieves against torts when the remedy at law is inadequate. It was inadequate in Dixon's nine classes, and may be equally so in a dozen new classes. Of course a different system of law, which is

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[19] 90 N. J. Eq. 110, 106 Atl. 547, 549 (1919).

[20] 1 LIFE AND LETTERS OF CHARLES DARWIN, 57 (ed. 1901). I have heard a thoughtful woman argue against gambling thus: There are four ways to obtain money, earning, finding, receiving a gift, stealing. Gambling is neither of the first three. Therefore, it is the fourth.

rooted in logic and not in experience, must be on the watch for altogether different dangers.

Another case of easements is *Wilkins* v. *Diven*.[21] A had an easement to take water through an underground pipe from an excellent well on B's land. B found the well interfered with a proposed new house, so blocked it up and removed the pipe. A began to dig across B's land to repair and restore his well connection. He was obtaining city water, adequate for his needs except that the well would furnish cool, refreshing drinking water in summer. B sued to enjoin the trespass, and A on his side asked for a mandatory injunction to reëstablish his easement. The court held that although A was entitled to substantial damages at law, the deprivation of the easement did not very seriously affect his enjoyment of his property, so that he was denied specific relief and forbidden to resort to self-help.

"Easements appurtenant to dominant estates are given greater significance in England than in America . . . and properly so, no doubt, since conditions tend to become settled and crystallized in long-established communities. With us, there is constant transition, growth, improvement. Our hamlets of yesterday become substantial towns to-day and will be great cities to-morrow. It would ill accord with our ever-advancing development and progress to tie us down too rigidly by giving undue significance to old ways and to old notions." [22]

This careless attitude toward an admitted property right which meant much for human enjoyment is open to serious criticism. The court sanctioned private eminent domain and compelled A to sell out to a wilful wrongdoer. Although it thought B's destruction of the easement too slight a matter to enjoin, it was entirely willing to enjoin the much slighter temporary trespass by which A could have restored the well-pipe without, apparently, any serious injury to B's house.

This question, how far an injunction should be held not to be a matter of right, will recur under nuisances.

(2) *Nuisances*

Many of the decisions in equity on nuisances involve chiefly the question, is there a nuisance? Thus the following situations have

[21] 187 Pac. (Kan.) 665 (1920); noted in 18 MICH. L. REV. 703 (1920).

[22] 187 Pac. (Kan.) 665, 666 (1920).

lately been held tortious: a portable lunch-wagon licensed by the city and standing directly in front of the plaintiff's restaurant;[23] a public garage;[24] bowling alleys used noisily, with shower-baths visible from neighboring residences;[25] a sanitarium for colored people where the sick were exposed to view and automobiles were constantly engaged in carrying away the dead;[26] an undertaking establishment in a residential district.[27] How far purely mental discomfort constitutes a nuisance is doubtful. A hospital for tuberculosis of the joints, etc., is not a nuisance, although the neighbors had an unreasonable fear of contagion.[28] No depreciation of land-values was proved; even if it existed, the same result should follow. The law cannot stifle hospitals to protect hysterical neighbors from dangers which science declares unreal; there is an adequate remedy for the neighbors in the study of hygiene. Other situations held not to be nuisances are: cheap two-room shacks crowded together in a residential district;[29] the alteration of a house-wall from brick to wood, in violation of a fire-limit ordinance, causing increased danger of fire to the plaintiff's house adjoining;[30] the development of land for a colored residential neighborhood.[31] All these cases show that depreciation of the pecuniary value of the plaintiff's property is not decisive. On the one hand a clear interference with his comfort may be enjoined without any proof of depreciation; on the other, many acts causing depreciation are not nuisances. Although equity in enjoining nuisances is protecting an interest of substance, that interest is not in the monetary value of the land, but in the opportunity to make beneficial use thereof as one of the incidents of ownership.

Although it is important to ascertain the nature of the tort of

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[23] Strong *v.* Sullivan, 181 Pac. (Cal.) 59 (1919); annotated in 4 A. L. R. 59.

[24] Hohl *v.* Modell, 264 Pa. 516, 107 Atl. 885 (1919); noted in 68 U. OF PA. L. REV. 292, 18 MICH. L. REV. 234. *Cf.* Myers *v.* Fortunato, 108 Atl. (Del. Ch.) 678 (1919); noted in 4 MINN. L. REV. 540.

[25] Magel *v.* Gruetli Benev. Soc., 218 S. W. (Mo.) 704 (1920).

[26] Giles *v.* Rawlings, 148 Ga. 575, 97 S. E. 521 (1918).

[27] Goodrich *v.* Starrett, 108 Wash. 437, 184 Pac. 220 (1919); noted in 18 MICH. L. REV. 246; Osborn *v.* Shreveport, 143 La. 932, 79 So. 542 (1918).

[28] Frost *v.* King Edward VII, Welch, etc. Assn., [1918] 2 Ch. 180; noted in 17 MICH. L. REV. 428.

[29] Worm *v.* Wood, 223 S. W. (Tex. Civ. App.) 1016 (1920).

[30] Landon *v.* Kwass, 123 Va. 544, 96 S. E. 764 (1918).

[31] Diggs *v.* Morgan College, 133 Md. 264, 105 Atl. 157 (1918).

nuisance in order to understand the basis of equity jurisdiction, still courts of equity in the cases reviewed above are not really dealing with any question of equity but with the law of torts, just as they determine the law of contracts, when they ask whether a promise has consideration before they specifically enforce it. We now pass to a genuine problem in equity.

If the continuance of an undoubted tort to property is assured, does an injunction issue automatically as a matter of right, or is it only a matter of grace? Will it be refused when it would inflict a hardship on the defendant and perhaps on the public, out of proportion to the benefit to the plaintiff? This problem is not confined to nuisances. *Wilkins* v. *Diven*[32] raised it for easements. However, it occurs most frequently in nuisance cases, because the tort is usually continuous and not a wilful wrong, but incident to the operation of a lawful occupation which the courts dislike to hamper. The problem is so difficult that it requires a much fuller discussion than can be given here. A brief summary of the recent cases must suffice. Three situations must be distinguished. (1) The injury to the plaintiff is small *absolutely*. If an injunction would seriously burden the defendant, it will be denied.[33] (2) The injury to the plaintiff is large *absolutely*, but small *relatively* to the hardship of an injunction upon the defendant and perhaps those members of the public who work for him or buy from him; the defendant has no powers of eminent domain. Since the denial of a permanent injunction allows the defendant to take the plaintiff's valuable property right in the enjoyment of his land for private purposes for a speculative compensation assessed by a jury, some cases favor granting equitable relief.[34] Other cases deny relief on the ground that equity should not act oppressively and that equities should be balanced or compared.[35] Should this view be taken, it is much fairer to the plaintiff for equity to assess the damages and frame its decree so that the defendant will be enjoined unless the sum be promptly paid. This avoids the need of a second suit in the law court, and is especially desirable when damages would be

[32] Note 21, *supra*.

[33] Scott *v.* Glenwood, 105 Kan. 603, 185 Pac. 731 (1919).

[34] Holman *v.* Athens Empire Laundry Co., 149 Ga. 345, 100 S. E. 207 (1919), citing Hennessy *v.* Carmony, 50 N. J. Eq. 616, 25 Atl. 374 (1892); see Folmar Mercantile Co. *v.* Town of Luverne, 83 So. (Ala.) 107 (1919), 3 JJ. dissenting.

[35] Richard's Appeal, 57 Pa. 105 (1868); 31 L. R. A. (N. S.) 881, note.

given at law only for injuries up to the date of the writ, so that repeated actions would be necessary.[36] (3) The situation is like the second group, except that the defendant is a public service company, municipality, or other body entitled to the power of eminent domain. The taking of the plaintiff's right of enjoyment of his land is now as legitimate as the physical occupation by the defendant of the land itself, so long as proper damages are paid. Therefore an injunction should be denied except to insure compensation as above. This eminent domain factor is frequently overlooked and cases in this group lumped in with group (2). Several recent cases deny equitable relief, but on various grounds.[37]

During the war, several cases arose in which a wrongdoer was doing work for the government. The cases were divided, whether the injunction should be refused because the continuance of the wrong would increase the supply of munitions.[38]

(3) *Public Nuisances (including Large Strikes)*

Equity finds it easy to enjoin public nuisances, partly because of their analogy to private nuisances and partly because the Chancellor is in some sense the representative of the sovereign as *parens patriae*, the guardian of the people's welfare. Nevertheless, the jurisdiction is peculiar. The Attorney General is not protecting what Dean Pound classifies as public interests; that is, the rights of the state as owner of property. There is no resemblance to an injunction against a nuisance near the State House. He is acting on behalf of the public at large to safeguard their comfort and health. He is protecting what Dean Pound calls social interests,[39] those of the community rather than of the government. Thus, equity at this point really goes beyond securing property rights.

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[36] Robb *v.* Rubel, 107 Misc. 33, 176 N. Y. Supp. 462 (1919).

[37] Folmar Mercantile Co. *v.* Town of Luverne, *supra;* Mayor, etc. of Baltimore *v.* Sackett, 135 Md. 53, 107 Atl. 557 (1919); Kinsman *v.* Utah Gas & Coke Co., 177 Pac. (Utah) 418 (1918).

[38] Driver *v.* Smith, 89 N. J. Eq. 339, 104 Atl. 717 (1918), *semble*, injunction of breach of contract should issue; State Department of Health *v.* Chemical Co. of America, 41 N. J. L. J. 163 (1918), public nuisance not enjoined. Other decisions, but not in war, which denied an injunction of torts indirectly beneficial to the United States government, are: Marconi Wireless *v.* Simon, 231 Fed. 1021 (C. C. A. 2d, 1916); Foundation Co. *v.* Underpinning, etc. Co., 256 Fed. 374 (S. D. N. Y., 1919).

[39] "An Introduction to American Law," Dunster House Papers, No. 3, Cambridge, 1920, p. 4.

Some of the oldest cases in this field involve the rights of the community in tide-flowed lands,[40] and the precise nature of those rights has been the subject of dispute ever since.[41] Can the state use the submerged land for any purpose it pleases; for instance, can it fill in a large tract in front of a beautiful seashore residence and build cheap shacks on the made land for the use of tenement-house denizens badly in need of salt air? Or is it restricted to purposes of navigation, and if so, what is navigation? In *Tiffany* v. *Town of Oyster Bay*,[42] the plaintiff had filled in a large tract of land previously submerged, acting under a state grant which proved to be void, since the defendant had title under a colonial patent from Governor Andros. After refusing to let the plaintiff restore the land to its original position, the defendant began to build public bathhouses on the tract. The plaintiff obtained an injunction against the bathhouses, with an election in the town to have the filling removed at the plaintiff's expense. This decision is contrary to the English view, also held in some states, that the state has a *jus privatum* in tide-flowed lands, just as in escheated lands, so that any person making an unauthorized use of the flats commits not only a public nuisance, but a purpresture as well,[43] *i. e.*, an interference with the property of the state.

The question whether a place of amusement is a nuisance because it attracts disorderly crowds is raised by two cases. *Commonwealth* v. *Smith* held that outdoor games conducted on Sundays in a public park by permission of the commissioner would not be enjoined. The finding of the lower court that there was no nuisance was conclusive; and even though the games were perhaps illegal under a Sunday law of 1794, "it is well settled that a bill will not lie having for its sole purpose an injunction against the mere commission of a crime."[44] The public nuisance point is

[40] Atty. Gen. *v.* Richards, 2 Ans. 603 (1795).

[41] "Tide-Flowed Lands and Riparian Rights in the United States," W. R. Tillinghast, 18 HARV. L. REV. 341, "The Power of the State to Grant Lands under Navigable Waters to the Abutting Upland Owner," 30 HARV. L. REV. 171; FREDERIC R. COUDERT, CERTAINTY AND JUSTICE, 205 *ff.* Mr. Coudert was counsel for the plaintiff in the Tiffany case.

[42] 192 App. Div. 126, 182 N. Y. Supp. 738 (1920); one judge dissenting; reversing 104 Misc. 445, 172 N. Y. Supp. 356 (1918); noted in "Riparian Rights and Tide-Flowed Lands," 30 YALE L. J. 58.

[43] Atty. Gen. *v.* Richards, note 40, *supra*.

[44] 109 Atl. (Pa.) 786 (1920).

only incidental in the interesting case of *Star Opera Co.* v. *Hylan*.[45] The plaintiff began in the autumn of 1919 to give a series of operatic performances in German in New York City. Riotous hostile crowds surrounded the opera house at the opening performances and came into active collision with the large body of police called out by the city. The mayor then forbade further German operas. The court refused to prevent the enforcement of his order. The opinion relies somewhat on decisions holding it a nuisance to arouse disorderly opposition. The famous Salvation Army case [46] shows the unfairness of allowing a gang of toughs to make any innocent meeting unlawful by mobbing it. Still, if a gathering creates a situation which will obviously get beyond the control of the police if it continues, a dispersing order may be given and enforced. A proposed series of such meetings might well be considered a public nuisance and enjoined. In the principal case, however, even if there was no public nuisance at common law, the mayor had power to make regulations of public meetings in order to avoid serious disturbances and an undue concentration of the police night after night in one spot. The court might have refused to enjoin the operas; but it could not properly have enjoined the action of the city authorities.

Two Iowa cases show how difficult it is to apply the familiar principle that public nuisances give rise to private actions only by persons who suffer special damage, different from that of the public at large. An injunction against the obstruction of a public highway was granted when the plaintiff used it as one of his avenues of travel to the county seat and other market places, although there is no statement that other roads were much longer;[47] yet relief was denied to a man in the ice business who was about one-eighth of a mile from his source of supply at the river over the highway blocked by the defendant, in consequence of which the ice had to be hauled four miles.[48]

The difficulty has often been solved by statutes allowing private persons to start proceedings against specified public nuisances.

[45] 109 Misc. 132, 178 N. Y. Supp. 179 (1919); noted in 18 MICH. L. REV. 245.

[46] Beatty *v.* Gillbanks, 9 Q. B. D. 308 (1882). See A. V. DICEY, LAW OF THE CONSTITUTION, 8 ed., Chapter VII.; Z. CHAFEE, JR., FREEDOM OF SPEECH, 183 *ff.*

[47] Krueger *v.* Ramsey, 175 N. W. (Ia.) 1 (1919).

[48] Livingston *v.* Cunningham, 175 N. W. (Ia.) 980 (1920); Folmar Mercantile Co. *v.* Town of Luverne, 83 So. (Ala.) 107 (1919), *accord.*

Thus California permits any citizen or consumer of water to maintain an action to enjoin a water company or municipality from supplying water without a permit from the state board of health. In *Frost* v. *Los Angeles*[49] relief was refused partly on constitutional grounds and also because the water, though unlicensed, was pure and sanitary. The court said that an injunction would merely protect a technical right without benefit to the plaintiff at the cost of the greatest imaginable inconvenience to the population of Los Angeles. The court in deciding that the water was wholesome assumed a function which the legislature had expressly vested in an administrative board of experts. A better way to avoid public inconvenience would have been to grant an injunction which was not to take effect if the city should apply to the board within a reasonable time for a permit and should obtain it. If the board refused the permit, the court should not consider the balance of convenience.

A crime may also be a public nuisance at common law or under a general nuisance statute.[50] If so, an equitable proceeding has some marked advantages over a prosecution. It protects the public without punitive consequences to the defendant for his past conduct. It operates very rapidly with less risk of miscarriage than a jury trial involves. Consequently the legislature has found it very desirable to create new kinds of public nuisances, so that various kinds of criminal or anti-social conduct may be enjoined at the suit of the state's attorney or even a private citizen. Such statutory nuisances include buildings used for prostitution;[51] and places where intoxicating liquors are sold contrary to law, which has been construed to include automobiles. In an Iowa case,[52] the court restrained the sheriff from returning the car to the boot-legger until a full hearing was had. Indeed, the Iowa law seems to make carrying liquor on one's person for purposes of sale

[49] 183 Pac. (Cal.) 342 (1919); noted in 8 CAL. L. REV. 127, and as to water regulations in 6 A. L. R. 475.

[50] Hoover *v.* State *ex rel.* Selby, 176 Pac. (Okl.) 889 (1918), disorderly public dance hall.

[51] Chase *v.* Proprietors of Revere House, 232 Mass. 88, 122 N. E. 162 (1919); Selowsky *v.* Superior Court, 181 Pac. (Cal.) 652 (1919); "'Red Light' Injunction and Abatement Acts," 20 COL L. REV. 605, collects the statutes and cases.

[52] State *ex rel.* Johnson *v.* Raph, 184 Iowa, 28, 168 N. W. 259 (1918); see also note 15, *supra*.

subject to injunction.[53] It is obvious that the legislative power must have some limits, and cannot transfer every crime from the jury to the equity judge just by calling it a nuisance. On the other hand, it can extend the common-law boundary somewhat to include situations resembling common-law nuisances in nature. In other words, a court has to balance interests to decide whether a nuisance exists. Legislatures may also do this balancing, and may reach a different result from the courts, just as courts often differ among themselves whether certain border-line acts are nuisances. The statutes just described apply to such border-line acts and have been repeatedly held a valid extension of the traditional jurisdiction of equity.[54] Nevertheless, a recent New Jersey decision [55] holds a liquor nuisance statute unconstitutional, partly because of its inadequate title, but mainly on the ground that courts of equity have only the powers they possessed at the time of the state constitution, and that public nuisances were then abatable only in criminal courts. The court admits a few concrete exceptions, and after the fashion of *Hart* v. *Leonard* [56] it classifies the public nuisances which will be enjoined into businesses endangering property (such as a powder factory), purprestures of highways or navigation, nuisances dangerous to the health of the whole community, and *ultra vires* acts of corporations. The principal case, of course, falls outside these classes, but it could easily be brought within an additional class made from the non-statutory decisions enjoining disorderly houses, bull-fights, and prize-fights.[57] The court goes too far in saying: [58]

"No instance can be found in the English reports, nor in the reports of this country, in states where the common law prevailed and still prevails, where a court of equity has ever taken cognizance of a case of a public nuisance founded purely on moral turpitude.

"It is clear that if the Legislature may bestow on the Court of Chancery jurisdiction to grant an injunction and abate a public nuisance of a

[53] Eaton *v.* Meyer, 176 N. W. (Ia.) 636 (1920).

[54] Chase *v.* Proprietors of Revere House, *supra;* 20 COL. L. REV. 605; Littleton *v.* Fritz, 65 Ia. 488, 22 N. W. 641 (1885).

[55] Hedden *v.* Hand, 90 N. J. Eq. 583, 107 Atl. 285 (1919); annotated in 5 A. L. R. 1474.

[56] Note 18, *supra.*

[57] 20 COL. L. REV. 606, n. 13; 5 POMEROY, EQ. JUR., 4 ed., § 1893; Atty. Gen. *v.* Fitzsimmons, 35 AM. L. REG. (N. S.) 100 (Ark., 1896); note 50, *supra.*

[58] 90 N. J. Eq. 583, 593, 107 Atl. 285, 290 (1919).

purely criminal nature, then there can be no valid argument against the power of the Legislature to confide the entire Criminal Code of this state to a court of equity for enforcement. It is apparent that such a court would render nugatory the provisions of the Constitution, which guarantee the right of a presentment by a grand jury, and a trial by jury, to one accused of crime."

While the decision points out a real danger from these statutes, it errs in limiting them to the precise precedents cited, which do not represent the full range of non-statutory equitable jurisdiction over nuisances, instead of requiring that the statutes shall keep within the general principle which underlies that jurisdiction as a whole.

Somewhat analogous to the restraint of a public nuisance at the suit of a person especially aggrieved is the injunction obtained by a street railway against jitneys operating in violation of penal statutes and ordinances.[59] Although equitable jurisdiction was not conferred by the statutes, it may be based on the invasion of private property rights. In addition to the nuisance analogy, the plaintiff may be said to have an easement entitled to protection against others besides the servient party.[60] Moreover, franchises have long been safeguarded in equity, even though not exclusive, against any one who does not have authority from the state to compete.[61]

Strikes or their incidents have frequently been enjoined because of the threatened injury to private property. Such decisions depend so largely upon the principles of labor law that they fall outside the province of this article. During the war, however, courts of equity have sometimes taken jurisdiction of trade disputes on an entirely different ground of public interest, and these cases may conveniently be discussed in connection with public nuisances.

A lower New York court[62] enjoined all strikes "for any cause whatever" in a business necessary to the prosecution of the war. A

[59] Puget Sound, etc. Co. *v.* Grassmeyer, 102 Wash. 482, 173 Pac. 504 (1918); noted in 28 YALE L. J. 485. For a similar case of competing telephone companies, see Farmers, etc. Telephone Co. *v.* Boswell Telephone Co., 187 Ind. 371, 119 N. E. 513 (1918).

[60] See the authorities for this position in 28 YALE L. J. 485.

[61] 1 AMES, CASES ON EQUITY JURISDICTION, 665, note.

[62] Rosenwasser *v.* Pepper, 109 Misc. 457, 172 N. Y. Supp. 310 (1918), adversely criticized in 32 HARV. L. REV. 837.

United States court granted a strike injunction under similar circumstances; the jurisdiction was based on the governmental need of munitions, since there was no diversity of citizenship.[63] Another United States court [64] without any diversity of citizenship enjoined a vendor of coal from disobeying the order of a state fuel administrator, acting under the Lever Act,[65] to furnish coal to the plaintiff at a contract price considerably below the maximum fixed by the President. The court found no clause in the Lever Act conferring equitable jurisdiction, but said: [66]

"Clearly it gives power to the President, through officers authorized to be and appointed by him, to so conserve and regulate the distribution of food and fuel in such way that greed and extortion should not run riot, and the ability of men, women, partnerships, and corporations to work for the successful ending of the country's conflict should not be either crippled or hindered. . . . The primary duty and obligation of federal courts are to construe and enforce the federal laws. For this purpose they were created.

"It cannot be assumed that, because Congress did not expressly so provide, federal courts can shirk the responsibility of enforcing the administrative orders of the fuel administrators acting legally and rightly within the terms and requirements of this act. Therefore it is not only permissible, but an absolute obligation upon this court, upon the appeal here made, to see to it that this order of the state fuel administrator is enforced."

The far-reaching assumptions of these cases are obvious. For instance, the last case involves the proposition that any administrative official may enforce his orders, not merely by the administrative or criminal processes specified in the law under which he acts, but by injunction.

Similar questions are raised by a much more important case, *United States* v. *Frank J. Hayes et al.*[67] The Attorney-General of

[63] Wagner Electric Mfg. Co. *v.* District Lodge, No. 9, International Assn. of Machinists, 252 Fed. 597 (E. D. Mo., 1918).

[64] West Virginia Traction & Electric Co. *v.* Elm Grove Mining Co., 253 Fed. 772 (N. D. W. Va., 1918).

[65] *Infra*, note 68.

[66] 253 Fed. 772, 777 (1918).

[67] U. S. D. C. Ind., Nov. Term, 1919, In Equity, No. 312; Oct. 31, 1919; Nov. 8, 1919. The bill and temporary restraining order have been printed (Wash., 1919); and all the pleadings and decrees up to Dec. 3, 1919, are included in the printed Information for Criminal Contempt (in Harvard Law School Library). No report of

the United States obtained from a United States District Court a temporary restraining order against specified officers of the United Mine Workers of America and their unnamed associates, directing the defendants not to issue strike orders or distribute strike benefits to miners or mine workers in the bituminous coal fields of the United States. After a hearing, the order was continued as a temporary injunction *pendente lite*, with a mandatory provision for the recall of the strike within seventy-two hours. An order of the union officials for that object was subsequently approved by the court. No written opinion was filed.

For the purposes of this article, it may be assumed that the Lever Act [68] to punish conspiracies to restrict the production and distribution of necessaries in war-time was in force, and also the wage agreement between the coal operators and the union members, which had been approved by the government; that both the statute and the agreement were violated by the strike; that the miners could therefore have been sued by the operators and prosecuted by the government. The only question here is how a court of equity had power to grant relief at the suit of the United States.

The following grounds have been suggested:

1. Protection of federal property rights in the mails and the operation of the railroads under control of the Director-General. This is in my opinion the strongest argument in favor of the coal-strike injunction, and finds an analogy in the injunction against the Pullman strikers in 1894, which was sustained by the Supreme Court in the Debs case.[69] Nevertheless, the analogy is far from complete. It is one thing for the government to restrain the direct interference with the operation of mail trains through violence on the spot. But it is a very much wider exercise of federal authority to prevent indirect interference through the curtailment of the production of coal. Where is the jurisdiction to stop? Have the federal courts equitable jurisdiction over all the employees of persons who make contracts with the United States for the supply of essentials? Furthermore, if the action of the strikers is not to be considered too remote to be an injury to the property rights of

the decision has been published, and so far as can be ascertained, no opinion was filed by the court. The case is approved in 5 CORNELL L. Q. 184.

[68] Act Aug. 10, 1917, 40 STAT. AT L., ch. 53, § 9, p. 279; U. S. COMP. STAT. 1918, § 3115⅛ i, amended by Act, Oct. 22; 1919; 66th Cong., 1st Sess., ch. 80, 1919, p. 298.

[69] *Re* Debs, 158 U. S. 564 (1895).

the government, it must also constitute a tort to private persons. A manufacturer who has a contract for the delivery to him of coal would also have the right to obtain an injunction against striking miners. It seems very probable that the causation is here too remote to constitute a tort in the absence of legislation. In a converse case, where a failure of the railroad to furnish rolling stock led to the shutdown of a coal mine, the miners were held to have no cause of action against the railroad.[70] The argument that the strikers are causing the mines to break contracts with the United States and hence are liable under the principle of *Lumley* v. *Gye*,[71] is open to similar difficulties, especially as the strike was not specifically directed against these contracts. Finally, if the injunction is based on a federal property right in the supply of coal, it should restrain the strike only to the extent that it prevents the delivery of coal to the railroad and not also compel the production of coal for private consumption.

2. Public Nuisance. Some language in the Debs case [72] has led to the belief that the federal courts have jurisdiction to issue an injunction on this ground. Doubtless the federal interest in the mails threatened in 1894 was analogous to the interests infringed by public nuisances, so that it was easy to exercise equitable jurisdiction once a federal right had been established. The right must, however, be based on something besides the nuisance. There is no clause in the Constitution which gives the United States power to abate public nuisances unless they also infringe some federal right created by the Constitution. The health, comfort, and general welfare of citizens are in charge of the state governments and not of the United States. Or, to put the matter in another way, the injunction of public nuisances is based on the police power, and the federal government has no police power independent of its express powers. The Constitution did not see fit to entrust to the general government the control of conduct on the sole ground that in the opinion of Congress, or United States judges, such conduct threatened widespread injury to the country at large.

3. Interference with Interstate Commerce. This raises the same

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[70] Ill. Cent. R. R. Co. *v.* Baker, 155 Ky. 512, 159 S. W. 1169 (1913).

[71] 2 E. & B. 216 (1853).

[72] 158 U. S. 564 (1895). See the comment on this case in W. HARRISON MOORE, ACT OF STATE IN ENGLISH LAW, 30.

question as the first ground, even if, as was stated by the Supreme Court in the Debs case, such commerce may be regulated by the courts as well as by Congress.

4. Specific performance of the wage agreement. Even if we overcome the objections to compulsory personal service, the government has no interest which would enable it to enforce this contract. It is not a party thereto, and is a beneficiary only in a remote sense.

5. Violation of the Sherman Act.[73] This ground is not alleged in the bill and is rejected by a note in the *Cornell Law Quarterly* supporting the decision.[74] The Clayton Act [75] would create very great difficulties.

6. Interference with the war. If we assume that the war was raging in November, 1919, then the coal-strike was a sufficient hindrance thereto for Congress to legislate against it. Such legislation might have conferred equitable jurisdiction on the courts in furtherance of the war power, by analogy with the statutory extension of equitable jurisdiction in the Sherman Act. Since, however, Congress did nothing of the sort, the supporters of the injunction on war grounds must rest on either of two contentions. (a) It may be argued that a United States court has power to enjoin any act which hinders the war, regardless of the absence of Congressional authorization. The sweeping character of this claim is its own refutation; and the Constitution vests the war power in Congress, not the courts. (b) It may be argued that if the defendant's conduct violates a war statute so as to cause widespread injury analogous to a public nuisance, then although this statute confers no equitable jurisdiction, nevertheless the illegal conduct may be restrained. Some such view probably lies behind the reliance on the Lever Act, discussed below. If it is sound, then the silence of Congress about equitable jurisdiction need not prevent mandatory injunctions to compel men to register under the Selective Service Act, and prohibitions against the distribution of books considered by the judges to violate the Espionage Act. The fact that Congress has provided very different methods for enforcing

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[73] Act of July 2, 1890, 26 STAT. AT L. 209. See State *v.* Employers of Labor, 102 Neb. 768, 169 N. W. 717 (1918), under state anti-trust law.

[74] 5 CORNELL L. Q. 187.

[75] 38 STAT. AT L. 730.

these war statutes is a very serious objection to the assumption that they are also within the jurisdiction of equity, which Congress did not mention.

7. Violation of the Lever Act.[76] This is the main ground put forward in the bill and is accepted as sufficient by the *Cornell Law Quarterly*. Nevertheless, it seems to me wholly untenable. If there is one principle of equity which can be regarded as settled, it is that a crime will not be enjoined merely because it is a crime. Some other aspect of the defendant's conduct must bring the case within the established jurisdiction of chancery. The Lever Act declares violations thereof to be crimes subject to criminal penalties. Not a clause makes them a ground for equitable relief.

Consequently, the coal-strike injunction can be supported only if it was based upon the infringement of a definite federal right. The existence of such a right must remain conjectural in the absence of any written opinion from the United States District Court of Indiana. Over a century has elapsed since the greatest of chancellors declared, "I have no jurisdiction to prevent the commission of crimes."[77] A conservative lawyer of to-day may be permitted to share Lord Eldon's doubts, and express regret that Judge Albert B. Anderson felt unable to make public the reasons which led him to differ from the foremost English advocate of law and order, who even during the disturbance of the French Revolution refused in the absence of legislative authority to strengthen the power of the government by placing the Court of Chancery at the disposal of the criminal law.

Even though the court had jurisdiction to enjoin the coal strike, the question still remains whether that jurisdiction should have been exercised. Undoubtedly an emergency confronted the government, but if an injunction had been refused, there were alternative remedies through legislative or executive action. The

[76] See note 68, *supra*.

[77] Gee *v.* Pritchard, 2 Swans. 402 (1818). See Cope *v.* Dist. Fair Assn., 99 Ill. 489 (1881). An early case is Wakeman *v.* Smith, Toth. 12 (1585).

The coal-strike injunction has served as a precedent for injunctions against violations of criminal syndicalism statutes, although the penalties provided by such statutes are (except in New Hampshire, Laws, 1919, c. 155) wholly criminal in character. I have not found any reported case, but have seen newspaper accounts of injunctions forbidding membership in the Industrial Workers of the World in Washington (*Boston Herald*, Jan. 4, 1920 and *New York Nation*, Jan. 3, 1920); Kansas (*New York Times*, June 24, 1920).

question deserves serious consideration, whether such types of action are not more expedient than an injunction in the case of a huge industrial dispute unaccompanied by violence. In favor of judicial proceedings is the fact that they guarantee a chance for both sides to be heard, whereas if Congress had handled the strike with legislation like the Adamson Law, or if the President had taken over the mines under his war powers, a hearing might have been denied. On the other hand, there is no obstacle to a hearing before Congress or the Executive which should be just as adequate and fair as that given by Judge Anderson, and such legislative or executive action has certain great advantages for the settlement of a huge industrial controversy which are not possessed by a court of equity. Such a court can stop the strike but it cannot remove the causes of the strike. There is a familiar equitable principle that a bill will be dismissed if the absence of necessary parties makes it impossible for the court to give a decree which will wind up the whole controversy in a just manner. A similar consideration might well have led to the dismissal of the government's coal strike bill on the ground that the main controversy between the operators and the miners ought not to be left hanging in the air after the incomplete remedy of an injunction, but could only be finally and justly settled by an investigation into the complex conditions at the mines and possibly a new wage agreement. Such an investigation could not be made by a court of equity. It could be made by the Executive. It was in fact eventually so made after the injunction. Consequently, since the court could not meet the real issue of the controversy, it might well have refused to have any half-way dealings with it in the absence of well-recognized grounds for judicial action, and might have left the government to make use at once of the executive powers which obviously must be employed sooner or later. Moreover, such action shifts a great and bitter dispute involving masses of people and wide economic ramifications from appointive judges who rarely have expert knowledge of such economic problems to the President, an elective official, clothed with powers which enable him to treat this problem like other war problems, drawing on the extensive assistance of experts and enforcing his decision by methods which are not available to courts. This shift relieves the Judiciary of a terrific strain which it is not

well fitted to bear. Under our constitutional system, the highly important task of adjusting conflicts between different portions of the system belongs to the courts. This task requires that the firmest confidence of the people in the correctness and fairness of judicial decisions shall be maintained. There is a genuine danger that this confidence will be shaken if the Attorney General calls on judges who are not equipped by long experience to solve difficult economic problems and who lack the powers necessary to solve them finally and obtains from them summary remedies affecting the industrial life of thousands. Perhaps eventually we shall establish Conciliation Courts fitted by training and experience and the possession of powers not now conferred on a United States District Court to settle great strikes to the satisfaction of all concerned. Until then, may it not be wise to entrust such controversies to Congress or the President who are at least as able to decide them as the courts, rather than cast a great burden on the Judiciary, which may weaken its accomplishment of its customary and invaluable work?

4. *The Extension of Equitable Jurisdiction beyond the Protection of Property Rights*

The first determined onslaught on the oft-repeated doctrine that equity protects only rights of property was made by Louis D. Brandeis and Samuel D. Warren in the pages of this REVIEW thirty years ago.[78] A quarter of a century afterwards an article by Dean Pound renewed the attack on a still broader front.[79] Each year brings increasing evidence that their views will eventually be accepted by courts and legislatures. The law courts from early times have protected interests of personality, for example, by actions of slander and libel. What rational principle forbids the application to such rights of the familiar rule that if there is a remedy at law which is inadequate, then equity gives relief, unless special considerations restrain the exercise of its jurisdiction?

The extension of equitable jurisdiction for the protection of human dignity and peace of mind has been made much easier through the ever widening meaning attached to the conception of property. The gulf between an acre of land and the right of privacy

[78] "The Right to Privacy," 4 HARV. L. REV. 193 (1890).

[79] "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 640 (1916).

may have been too broad for equity to bridge, but its jurisdiction over property has now extended from land and chattels to far more intangible human interests. It protects not only contracts, but the opportunity to make contracts through access to an open market for the sale and purchase of goods and services.[80] Public nuisances have only a remote relation to property rights through the analogy with private nuisances, and we have just seen the modern tendency to create new types of public nuisances within the scope of equity jurisdiction. Equity has long safeguarded such state-recognized mental property as patents, copyrights, and trademarks. These and the recent effects upon them of business events like the growth of the moving-picture industry lie outside the scope of this article.[81] Equity has also given more and more attention to similar mental creations which have not yet received any official guarantee of protection, — trade secrets,[82] unpublished poems, and private letters.[83] Indeed, at this point equity occasionally escapes from the realm of genuine property altogether and protects letters of no literary value whatever. Since the only interest actually safeguarded here is the writer's desire that his words shall remain private,[84] it is only a step to keeping his features private also. Yet that step, in the few jurisdictions where it has been made, took equity one hundred years.

That the law of literary property, aside from its relation to the right of privacy, may still undergo important development, is shown by *International News Service* v. *Associated Press*.[85] The Associated Press complained that the defendant systematically took news from the bulletin-boards and early editions of the plaintiff's members and sold it to the defendant's customers.

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[80] Cases on strikes, boycotts, etc., are omitted from this article with a few exceptions.

[81] 1 AMES, CASES ON EQUITY JURISDICTION, Chap. IV, § V. For recent developments see, "The Subject Matter of Copyright," 68 U. OF PA. L. REV. 215 (1920); "Trademarks," 7 CAL. L. REV. 201 (1919).

[82] "Basis of Jurisdiction for the Protection of Trade Secrets," 19 COL. L. REV. 233 (1919).

[83] AMES, *op. cit.*, 659.

[84] The leading case on letters, Gee *v.* Pritchard, 2 Swans. 402 (1818), protects letters of no value, though Lord Eldon covered over his progressive action by conservative language, saying that the plaintiff had a property right.

[85] 248 U. S. 215 (1918); noted in 32 HARV. L. REV. 566; 18 COL. L. REV. 257; 28 YALE L. J. 387; discussed in "Unfair Competition," Edwards S. Rogers, 17 MICH. L. REV. 490.

Those in distant cities frequently received the pirated items in time to publish them ahead of the local Associated Press newspapers. The Circuit Court of Appeals and the Supreme Court held that a preliminary injunction against this practice should have been granted. The difficulty lies in the well-established rule that literary property disappears on publication, unless protected by copyright. Nevertheless, it was held that news reports of facts, while not copyrightable, will be protected after publication. Justice Pitney, for the majority of five, rests his opinion partly on the prevention of unfair competition, partly on the existence of a valuable property interest in news, which necessarily cannot be kept secret like other kinds of literary property, and consequently remains "quasi property" with respect to competitors during a period after publication "while it is fresh." As against the public all rights in news lapse on publication.

"The underlying principle is much the same as that which lies at the base of the equitable theory of consideration in the law of trusts — that he who has fairly paid the price should have the beneficial use of the property. . . . It is no answer to say that complainant spends its money for that which is too fugitive or evanescent to be the subject of property. That might, and for the purposes of the discussion we are assuming that it would, furnish an answer in a common-law controversy. But in a court of equity, where the question is one of unfair competition, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience." [86]

Justice Pitney recognized the difficulty of determining the period of "freshness" during which the property right survives. The Circuit Court of Appeals directed an injunction "until its commercial value as news to the complainant and all of its members has passed away." He suggested a possible modification for a fixed number of hours consistent with the reasonable protection of the plaintiff's newspapers each in its own area.

Justice Holmes (Justice McKenna concurring) held that there

[86] 248 U. S. 215, 240 (1918).

was no property in news, but that it was unfair competition for the defendant to palm off the plaintiff's product as its own, although the opposite falsehood is more usual. He thought that the defendant should be enjoined from use for a fixed number of hours after publication unless it gave express credit to the Associated Press.

Justice Brandeis dissented, finding no tort at all. The public interest in the rapid dissemination of news is so great that equity should not protect a monopoly therein, establishing a new private right which is admitted not to exist at law and for which there is no precedent, with the result of curtailing the free use of knowledge and ideas. Such a right should be created, if at all, by the legislature, which is better fitted than the courts to establish at the same time proper restrictions on this new right. For example, the statute might allow an action for damages but not an injunction, having regard to freedom of speech by analogy with libels; or it might impose obligations on the owner of news to sell it to all newspapers who were willing to pay a reasonable price. Courts are powerless to prescribe the proper administrative regulations and machinery which are essential to the public welfare if any monopoly in news is to be recognized by law.

It seems more natural to base the relief in this case upon injury to the plaintiff's property rights in the business of gathering news, than to create a property in the news itself, which is very peculiar and hard to explain.

Another decision on the distribution of news involves the scope of the right of privacy, which was recognized by the New York legislature, after its existence at common law had been denied.[87] The statute[88] allowed an injunction and damages to any person whose "name, portrait, or picture" was used without written consent "for advertising purposes, or for the purposes of trade." This had been held to apply to the portrayal of a famous wireless operator in a fictitious motion play.[89] In *Humiston* v. *Universal Film Mfg. Co.*,[90] however, relief was refused to a woman lawyer, who

[87] Roberson *v.* Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478 (1902). *Contra*, Kunz *v.* Allen, 102 Kan. 883, 172 Pac. 532 (1918); noted in 28 YALE L. J. 269.

[88] N. Y. Civil Rights Law, §§ 50, 51.

[89] Binns *v.* Vitagraph Co. of America, 210 N. Y. 51, 103 N. E. 1108 (1913), L. R. A. 1915 C, 839, Ann. Cas. 1915 B., 1024.

[90] Humiston *v.* Univ. Film Co., 189 App. Div. 467, 178 N. Y. Supp. 752 (1919), reversing 101 Misc. 3, 167 N. Y. Supp. 98 (1917); noted in 33 HARV. L. REV. 711;

was photographed while engaged in the solution of the Ruth Cruger murder mystery, since the moving pictures here reproduced only the facts. Although the reproduction of the plaintiff's photograph in a news service film was literally within the statute, being clearly "for the purposes of trade," yet this particular form of exhibition, which had arisen since the statute, was held outside the intention of the legislature. The use of the plaintiff's name in a newspaper account of the murder would also be within the statute, yet obviously immune. A motion picture news service is only a new type of newspaper. It has been remarked that the ordinary newspapers are for those who cannot think, and this kind for those who cannot read. The case is interesting for its judicial limitation of a tort right created by a statute, after the manner of the Continental interpretation of codes; and also for the possibility that the new right of privacy is subject to a restriction analogous to fair comment in the law of defamation. A person who takes part in a public event may lose his right of privacy as to that event, and be obliged to submit to the dissemination of information to the public about his part therein, either by words or pictures.

We now consider cases in which equity has been asked to enjoin injuries to personality without statutory authorization. A woman was annoyed by a former attorney, who kept sending her abusive letters. Since they were apparently mailed before she made objection, an injunction was refused, but the court intimated that if the defendant continued after being requested to stop he might be restrained.[91] If there is any tort at all here, in the absence of publication of the letters to third persons, the remedy at law is clearly inadequate. The same difficulty about the existence of a legal right arises in *Drake* v. *Drake*.[92] The plaintiff's wife, who was separated from him, was said to have carried on a systematic campaign against him to make his life miserable, going to his office and charging him with immorality, abusing him when

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also in *ibid.*, 735; 20 COL. L. REV. 100; 68 U. OF PA. L. REV. 284; 16 MICH. L. Rev. 269, 18 MICH. L. REV. 437; 6 VA. L. REV. 376; 29 YALE L. J. 450. *Cf.* Feeney *v.* Young, 191 App. Div. 501, 181 N. Y. Supp. 481 (1920).

[91] Williams *v.* O'Shaughnessy, 172 N. Y. Supp. (Misc.) 574, (1918); noted in 19 COL. L. REV. 163 (1919). For an illustration of the real injury which such letters may cause, see JEAN-CHRISTOPHE, ROMAIN ROLLAND, vol. VI, "Antoinette." The courts often strain the facts into publication to establish a remedy at law for libel.

[92] 177 N. W. (Minn.) 624 (1920); noted in 4 MINN. L. REV. 538 (1920).

she met him on the street or in church, and causing societies to expel him. The court assumed that the "nagging" constituted "a series of personal torts," but refused to give relief, not for any want of equitable jurisdiction over such wrongs, but because tort suits between husband and wife should not be allowed to disturb "the tranquillity of family relations" and "the welfare of the home, that abiding place of domestic love and affection."

No such question of the existence of a legal tort arises in cases of false imprisonment, for which if long continued an action for damages is clearly inadequate. Equitable jurisdiction over such torts has, however, been denied for want of any property right in several cases under draft statutes.[93] In a recent decision [94] it was urged that the plaintiff, if unlawfully drafted, suffered an injury to property through the deprivation of the right to work. The court denied that such a right was property. This is wholly inconsistent with the numberless decisions holding the right to employ workmen is property, which equity will protect. The draft cases should rest on the adequacy of the remedy of *habeas corpus* or on the refusal of courts to exercise equitable jurisdiction when an action for damages will test the constitutionality or legality of the imprisonment without hampering the activities of a coördinate branch of the government in a national emergency. In the absence of such obstacles equitable jurisdiction has lately been exercised to prevent the deprivation of the right to work through false imprisonment. In *American Steel and Wire Company of New Jersey* v. *Davis*,[95] a corporation obtained an injunction against the Mayor and Chief of Police of Cleveland, who had begun to arrest wholesale without warrants all persons coming to the city to take employment in steel mills during the recent strike. It can hardly be contended that the prospective employer has a property right in such a case, but not the prospective employees.

A square decision that equity will protect rights of personality is *Stark* v. *Hamilton*.[96] The Supreme Court of Georgia had previ-

[93] Angelus *v.* Sullivan, 246 Fed. 54, 64 (C. C. A., 2d., 1917); Kneedler *v.* Lane, 3 Grant Cas. (Pa.) 523 (1863).

[94] Bonifaci *v.* Thompson, 252 Fed. 878 (1917); noted in 32 HARV. L. REV. 436 (1919).

[95] 261 Fed. 800 (N. D. Ohio, 1919).

[96] 149 Ga. 227, 99 S. E. 861 (1919); affirming 149 Ga. 44, 99 S. E. 40 (1919); noted in 33 HARV. L. REV. 314 (1919); 19 COL. L. REV. 413 (1919); 5 CORNELL L. QUART. 177 (1920); 18 MICH. L. REV. 335; 29 YALE L. J. 344.

ously recognized the right of privacy, in reliance upon the article in this REVIEW by Messrs. Brandeis and Warren,[97] and in this case cited the article by Dean Pound.[98] A man had debauched a minor girl and induced her to abandon her parental abode and live with him in a state of adultery. The father had him enjoined from associating with the girl and from communicating with her in any way, either by writing, telephoning, telegraphing, or through the aid and agency of any other person. This case goes even further than *Ex parte Warfield*,[99] which held that equity had jurisdiction, but did not involve the propriety of exercising the jurisdiction. That question was now directly raised by the affirmance of the injunction issued by the lower court. The case, like *Ex parte Warfield*, rests in part upon a statute, which allows to equity to restrain "a threatened or existing tort," but a less liberal court would have limited this to torts previously within equitable jurisdiction. The decision might have found an incidental property right in the father's interest in his daughter's services, but refuses to hang on such a property "peg."

"It is difficult to understand why injunctive protection of a mere property right should be placed above similar protection from the continual humiliation of the father and the reputation of the family. In some instances the former may be adequately compensated in damages, but the latter is irreparable; for no mere money consideration could restore the good name and reputation of the family, or palliate the humiliation of the father for the continual debauching of his daughter." [100]

One may approve this recognition of equitable jurisdiction over interests of personality, and at the same time doubt the wisdom and effectiveness of judicial interference with "the way of a man with a maid."

Although equity may take jurisdiction of the father's right to his daughter's services, it has refused in a recent Mississippi case[101] to enforce the reciprocal duty of the father to support his children. In that case the children asked the court to determine the amount

[97] Note 78, *supra;* Pavesich *v.* N. E. Ins. Co., 122 Ga. 190, 50 S. E. 68 (1904).

[98] Note 79, *supra.*

[99] 40 Tex. Crim. 413, 50 S. W. 933 (1899), on *habeas corpus* to nullify contempt proceedings for violation of an injunction obtained by a husband against a defendant who had alienated his wife's affections.

[100] 149 Ga. 227, 231, 99 S. E. 861 (1919).

[101] Rawlings *v.* Rawlings, 83 So. (Miss.) 146 (1919); noted in 18 MICH. L. Rev. 342.

necessary for their monthly support and make it a lien upon the real estate of the defendant. The majority held that the father's obligation does not run to the child, but only to the state and to outsiders who furnish necessaries to the child. For example, the Mississippi statute compelled a delinquent parent to pay the county eight dollars a month, an amount obviously inadequate. Although logically equity seems as well able to handle this problem as the long-established jurisdiction of compelling a husband to pay alimony to his wife (whether divorced or not), the historical basis is lacking in the principal case. The majority insist that the children must either have their father prosecuted and thus obtain their eight dollars or persuade their mother to get a divorce, with its attendant advantages of equitable relief. Otherwise, it refuses to enlarge its historical jurisdiction and provide them with adequate support.[102]

"'The repose of families and best interests of society forbid' any such action. If the chancellor can fix in advance the amount of support each dissatisfied child must receive, then is parental authority superseded by judicial fiat, parental discipline swept away by self-assertion and disobedience on the part of children, and the integrity of the home, the corner stone of society, is undermined."

Two dissenting judges excoriate this caution:[103]

"I cannot concur in the holding that the repose of society would be adversely affected by maintaining the suit in the present case. Any society that can consent to see children neglected by able parents, and whose repose would not be more disturbed by seeing children starved, maimed, and brutally handled, than it would by seeing the law make the parent fulfil his duties and obligations to his child, at the suit of the child, ought not to be tolerated at all. . . . If there be such a society in existence, it ought to be kicked off the earth, and forced to do its reposing in the abysmal depths of Gehenna, where children do not go." [104]

Zechariah Chafee, Jr.

HARVARD LAW SCHOOL.

[102] 83 So. 146, 148 (1920).

[103] *Ibid.*, 157, 158.

[104] The following recent cases on expulsions from clubs, labor unions, etc., are important in connection with equitable jurisdiction to protect interests of personality: Young *v.* Ladies' Imperial Club, Ltd., [1920] 1 K. B. 81; noted in 36 L. QUART. REV. 328; Burn *v.* National Amalgamated Labourers' Union, [1920] 2 Ch. 364; noted in 30 YALE L. J. 202. Weinberger *v.* Inglis, [1919] A. C. 606; Rueb *v.* Rehder, 24 N. M. 534,

174 Pac. 992 (1918); noted in 1 A. L. R. 423; Simpson *v.* Grand International Brotherhood of Locomotive Engineers, 83 W. Va. 355, 98 S. E. 580 (1919); noted in 33 HARV. L. Rev. 298, "Legal Status of Voluntary Associations"; Furmanski *v.* Iwanowski, 265 Pa. 1, 108 Atl. 27 (1919); Baltimore Lodge 405, International Assn. of Machinists *v.* Grand Lodge of International Assn. of Machinists, 134 Md. 355, 106 Atl. 692 (1919); Universal Lodge, No. 14, Free & Accepted Masons of City of Annapolis *v.* Valentine, 134 Md. 505, 107 Atl. 531 (1919); Knights of Pythias, etc. *v.* Grand Lodge, etc., 258 Fed. 275 (D. C. App. 1919); Gilmore *v.* Palmer, 109 Misc. 552, 179 N. Y. Supp. 1 (1919); O'Connor *v.* Morrin, 109 Misc. 379, 179 N. Y. Supp. 599 (1919); Bricklayers', etc. Union *v.* Bowen, 183 N. Y. Supp. 855 (1920); Love *v.* Grand International Division of Brotherhood of Locomotive Engineers, 139 Ark. 375, 215 S. W. 602 (1919); Walters *v.* Pittsburgh, 201 Mich. 379, 167 N. W. 834 (1918); noted in 28 YALE L. J. 201.

The following cases on political rights should also be consulted: Wayne *v.* Venable, 260 Fed. 64 (C. C. A. 8, 1919); noted in 20 COL. L. REV. 94; Barkley *v.* Pool, 102 Neb. 799, 169 N. W. 730 (1918); Weinland *v.* Fulton, 99 Ohio St. 10, 121 N. E. 816 (1918); noted in 32 HARV. L. REV. 859; Wilson *v.* Blaine, 262 Pa. 367, 105 Atl. 555 (1918); Payne *v.* Emmerson, 290 Ill. 490, 125 N. E. 329 (1919); noted in 29 YALE L. J. 655, 694; Spies *v.* Byers, 287 Ill. 627, 122 N. E. 841 (1919); Hamilton *v.* Davis, 217 S. W. (Tex. Civ. App.) 431 (1920); Haupt *v.* Schmidt, 122 N. E. (Ind.) 343 (1919); noted in 28 YALE L. J. 838.